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Western States Petroleum Association

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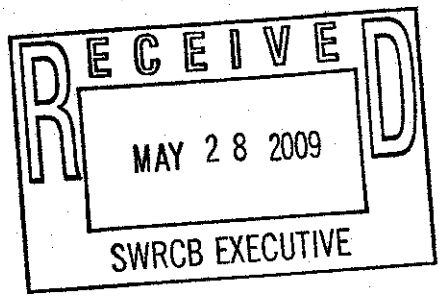

May 28, 2009

VIA E-MAIL and U.S. Mail
Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
Office of Enforcement
1001 I Street
Sacramento, CA 95814

Re: Comments on May 6, 2009 Draft Update to State Water Resources Control Board Water Quality Enforcement Policy

Dear Ms. Townsend:

The Western States Petroleum Association ("WSPA") appreciates the opportunity to submit comments on the State Water Resources Control Board's May 6, 2009 draft update to its Water Quality Enforcement Policy ("Policy").

WSPA is a non-profit trade organization representing twenty-eight companies that explore for, produce, refine, distribute and market petroleum, petroleum products, natural gas and other energy products in California and five other western states.

WSPA member companies own and operate a large number and variety of facilities throughout California that discharge process wastewater or storm water to waters of the state. These discharges are regulated either under individual or general National Pollutant Discharge Elimination System (NPDES) permits or Waste Discharge Requirements (WDRs).

In addition, WSPA members own or operate facilities or other properties that are subject to site cleanup requirements, corrective action, or other types of site remediation orders issued by regional water quality control boards (Water Boards).

WSPA members have a sincere interest in ensuring that enforcement actions by the Water Boards and the State Board – particularly those actions relating to calculation and assessment of administrative civil penalties – are conducted fairly and even-handedly, taking into consideration the particular circumstances of the discharger.

All enforcement carries with it a large element of discretion. However, the regulated community is entitled to know that individual enforcement decisions are being made in accordance with standards and criteria that are applied consistently around the state.

These standards should also be developed considering the wide range of factors that can impact how different types of violations are treated. We appreciate the State Board's efforts to increase the transparency of its enforcement process and to take steps to enhance the level of statewide consistency. Although we are generally aligned with the State Board's goals of providing fair and consistent enforcement, we have considerable concerns about the changes that are being proposed to the existing policy. These concerns are discussed below:

Section II, Enforcement Priorities

The existing Enforcement Policy contains a list of the specific kinds of violations that are considered "priority" violations. These violations are potential candidates for formal or informal enforcement action.

The violations include NPDES effluent and receiving water limitation violations, toxicity violations, violations of prohibitions, spills and other non-authorized discharges. Also included are failure to submit plans and reports or falsification of reports, violations of compliance schedules, violations of water quality objectives, violation of WDRs and other violations. While the list is lengthy, it clearly identifies the kinds of violations that are considered to warrant attention from an enforcement perspective. Significantly, the existing policy does not dictate any particular enforcement response to these violations.

The draft Policy would eliminate the list of priority violations, and instead establish a ranking system for all violations (Class I priority, Class II and Class III) based on a qualitative assessment of their impact on the environment or their threat to the integrity of the regulatory program.

These rankings are coupled with the admonition that "[e]very violation will result in the appropriate enforcement response," indicating that many lower level violations will now be pursued even if they have little, if any, affect on water quality and constitute only minor transgressions. See, Policy, p. 4.

The basis for this not-so-subtle shift in policy is not apparent, beyond the obvious revenue-generating aspects of any penalty program.
What's more, the rankings are described in very subjective terms, many of which are not defined. For example, Class I priority violations include those that have a "lasting effect" on water quality objectives.

What does this mean? How long is "lasting?" Would exceeding an effluent limitation for a bioaccumulative pollutant be considered "lasting," regardless of the mass or concentration of the pollutant that was discharged?

Likewise, what are "significant" threats to water quality? Are all violations involving impaired water bodies considered "significant" by default? What is the difference between "significant" and "substantial?" Many additional examples could be provided, all of which highlight the inherent ambiguity in the rankings and increase the likelihood that similarly situated dischargers could be treated very differently.

We also note that "measured or calculated violations of water quality objectives or promulgated water quality criteria" are classified as either Class II or Class III violations, depending on whether they are "significant" or "less significant." Policy, p.6-7.

Aside from the ambiguities surrounding these terms, individual dischargers may not be held accountable for violations of water quality objectives or standards unless such standards or objectives are specified as receiving water limits in a permit and a causal connection is established between the discharge and the water quality excursion.

Subsection B. of Section II discusses enforcement priorities for individual entities, and directs that "[t]o the greatest extent possible, entities with class I priority violations shall be the target of formal enforcement action." Policy, p. 7.

Aside from the negative connotations surrounding use of the word "target," most of the criteria listed in this section relate to the nature of the violation and the strength of the Water Board's case against the entity, and do not seem to have anything to do with the entity.

In fact, some of the "entity" criteria are largely duplicative of the "ranking" criteria discussed in Subsection A. It is unclear how these criteria are to be taken into account at this stage of the analysis or whether they might result in overestimation of the seriousness of a violation. Finally, we have significant questions about the value of "data algorithms" in this context and whether they could be developed to a point where they could reliably be used to assign priorities to individual violations.

Consistent with our comments on Alternative 1 below, we are opposed to establishing an enforcement mechanism that is overly mechanistic and that leaves little room for meaningful dialogue between the alleged violator and enforcement staff.

Section VI, Monetary Assessments in ACL Actions (Alternative 1)
WSPA has significant concerns with the penalty calculation methodology for monetary assessments in administrative civil liability (ACL) actions, as described under Alternative 1.

This alternative seeks to establish a highly formulaic approach to calculation of penalties. We believe this could lead to the assessment of extremely high penalties, far beyond those that have historically been assessed by the Water Boards for comparable violations and out of proportion to the seriousness of the underlying conduct or events.

This concern is heightened by the nature of the introductory discussion to this methodology, which has a very "prosecutorial" tone.

For example, while we agree that liability under the Water Code does not depend upon proof of actual harm, we strongly dispute the notion (included without any citation) that "the defendant must demonstrate that the penalty should be less than the statutory maximum." Policy, p. 10. Indeed, this assertion is contrary to the very calculation procedures that follow, in which agency enforcement staff are themselves directed to make a variety of downward adjustments to the initial penalty calculation in certain circumstances. We believe that the burden of proof is on the Water Board to identify and justify a proposed penalty consistent with statutory criteria and other relevant guidance.

Similarly, we dispute the statement that "a strong argument can be made that consideration of statutory factors can support the statutory maximum as an appropriate penalty for water quality violations, in the absence of any other mitigating evidence." Policy, p. 10.

We believe there are very few circumstances in which the statutory maximum penalty would be an appropriate penalty. "Hawkish" statements to this effect set an inappropriate tone that will only lead to an increase in contested penalty assessments and appeals to the State Board. The Legislature mandated consideration of a variety of factors in each and every instance where penalties are sought, with the clear intention that most penalties would not be set at the maximum level. "Maximum enforcement impact" (whether this is interpreted to mean maximum revenue generation or something else) is not a legitimate enforcement goal.

While we acknowledge there is a legitimate role for rigorous enforcement in appropriate circumstances, the suggestion that civil penalty decisions should be driven by their inherent "impact," rather than to redress actual or threatened harm and to encourage future compliance, is misguided as a matter of statewide policy.

Our specific concerns about the penalty calculation methodology described under Alternative 1 are highlighted below:

- The Policy does not contain any guidance on when a Water Board should initiate discretionary enforcement action rather than assessing mandatory minimum penalties (MMP) under Water Code section 13385(h) or 13385(i). We believe the MMP program, and the Expedited Settlement Program that most Water Boards have implemented, is an efficient means of resolving most types of violations and should be designated as the "preferred" method of enforcement.[1] Discretionary enforcement, with penalties that will invariably be significantly higher than MMPs, should be reserved for those cases that present special circumstances.

- The multi-faceted, multi-step process outlined in the Policy is confusing and overly complex and, in our view, is less informative than the comparable discussion contained on pages 34-41 of the existing policy. In general, we are concerned that Water Board staff would tend to view this process as a progressive series of discrete decisions, with little room for qualitative evaluation of the overall circumstances surrounding the violation.

  Many of the criteria are ambiguous or subjective, and are not readily susceptible to the scoring system that has been devised. Other factors which are described as distinct elements of the analysis seem inextricably linked to each other, giving rise to the possibility that certain considerations are "double-counted" in the process.

- Overall, the Policy evinces a clear preference for generating the maximum possible penalty that would be allowed under the law. Most notably, the Policy requires (or strongly implies) that where allowed by the Water Code, both daily and per gallon penalties should be determined and added together to arrive at the initial liability amount. Policy, p. 12 and p. 16 ("It is intended that Table 2 be used in conjunction

[1] The Policy states that MMPs should be issued within 18 months of when the violations qualify as mandatory minimum penalty violations. Policy, p. 27. This is more than double the period of time recommended in the current enforcement policy (i.e., 7 months or sooner if the mandatory penalty amount is $30,000 or more). WSPA notes that actions for MMPS are frequently delayed for many years, long after the applicable three-year statute of limitations has expired. While WSPA believes that timely processing of MMPs is important, adherence to the 18-month timeframe in the updated Policy will still alleviate our concerns over undue delay in assessment of mandatory penalties. To further this goal, we suggest the Policy be revised to foreclose MMP actions after a period of three years, obviating any need to resolve differences in legal opinion over the applicability of Code of Civil Procedure section 338(i) to administrative civil penalty actions.

with Table 1, so that both per gallon and per day amounts be considered where there is a discharge violation.").

Such "double" penalties are only authorized under Water Code section 13385, and by law are discretionary. In our experience, the Water Boards have not generally sought to impose both daily and per gallon penalties due to the inherent unfairness that would result, especially for high volume discharges. The current policy acknowledges that both per-gallon and daily penalties can be assessed in certain circumstances, but there is no other emphasis on this point.[2]

- WSPA acknowledges the inherent deterrent effect of substantial civil penalties. Nevertheless, deterrence of either the alleged violator or other similarly situated persons is not identified in Water Code sections 13327, 13351 or 13385 as a factor that has a direct role in the determination of the amount of civil penalties that should be assessed in a given case.

  We believe that identifying deterrence as a specific objective of the Policy (see Calculation Step 6, and Policy, p.20), and encouraging penalties to be increased in order to enhance that effect, goes beyond the authority of the Water Board. At the very least, it increases the likelihood that large corporations will suffer disproportionately higher penalties even for minor violations.

- We are unfamiliar with any penalty program that advocates increasing a proposed penalty based solely on the discharger's ability to pay, as is recommended by Step 6 in the penalty calculation. See also Policy, p. 21. The rationale that is offered for this step in the process — to provide a sufficient deterrent effect — is both inappropriate and unfair for the reasons set forth above.

- We disagree that "any assessment of administrative liability "any assessment of administrative liability . . . should fully eliminate any competitive advantage obtained from noncompliance." Policy, p. 11. Except perhaps in the most obvious and purposeful instances of noncompliance, identification and quantification of an actual competitive advantage resulting from a water quality violation would be an extremely complicated and time-consuming endeavor, necessitating the production and evaluation of highly confidential business information. Even EPA's BEN Model does not seek to recapture "competitive advantage."

  The need to protect this information would unduly complicate and prolong enforcement proceedings, and subject the process to potential abuse by competitors. Elimination of competitive advantage — separate and apart from recovery of economic benefit gained through the noncompliance — is not identified in Water Code sections 13327, 13351 or 13385 as a factor to be considered in assessing civil penalties and goes beyond the authority and reasonable capabilities of the Water Boards.

- Under Step 1, Factor 2, the characteristics of the discharge is scored on a scale of 0 to 4, ranging from benign wastes with negligible risk of harm (0) to hazardous wastes (4).

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[2] No mention is made of Water Code section 13350(f) which authorizes the Water Boards to assess administrative penalties in an amount less than the specified statutory minimum, if warranted based on the factors identified in section 13327. In contrast, Step 9 indicates that the calculated penalty may not be adjusted outside the statutory maximum and minimum amounts.

"Petroleum products" are lumped together with hazardous wastes under risk factor 4. This improperly suggests that exceedances of oil and grease limits would be assigned the highest score regardless of their actual potential for harm. Significant penalties may already be assessed for oil spills under a variety of other state and federal laws.

Further, with the exception of gasoline, very few petroleum products exhibit hazardous waste characteristics, and they should not be compared with hazardous wastes when assessing potential for harm. Significant penalties may already be assessed for oil spills under a variety of other state and federal laws.

- Under Step 1, Factor 3 (susceptibility to cleanup or abatement), the Policy states that this factor must be evaluated "regardless of whether the discharge was actually cleaned up or abated by the violator." Policy, p. 14. This provision unfairly disregards the Water Code provision that allows per gallon penalties to be assessed on only that portion of a discharge "which is not susceptible to cleanup or is not cleaned up." Water Code § 13385(b)(2) and (c)(2). Where a discharger promptly takes action to clean up or abate the effects of an unlawful discharge, this should be factored into the potential for harm associated with the violation.

- We do not believe the Water Boards have the authority to recover costs of investigation and enforcement as civil penalties. Policy, p. 22 (discussing other factors that justice may require). While such costs are sometimes awarded by courts in judicial actions, they are not appropriately identified as an upward adjustment factor in the penalty calculation under the rubric of "other matters that justice may require."[3]

- We are also confused by the statement that adjustment of a penalty amount is warranted where "consideration of issues of environmental justice indicates that the amount would have a disproportionate impact on a particular socioeconomic group."[4] It is unclear how the amount of a penalty assessed against a private company could ever have a disproportionate impact on some other group of people, whoever they may be. If the State Board intended to state that higher penalties should be assessed in any circumstance where environmental justice considerations are implicated, we believe this is inappropriate as a categorical statement. While agencies are directed to take environmental justice considerations into account in the enforcement of environmental laws in accordance with CalEPA's August 2004 Strategy on Environmental Justice, this is not a signal that higher monetary penalties should be assessed in these types of cases.

Section VI, Monetary Assessments in ACL Actions (Alternative 2)
Our numerous concerns with Alternative 1 suggest to us that Alternative 2 may be the preferable approach.

This alternative calls for the establishment of a Monetary Liability Recommendation Panel that would have more general discretion, consistent with statutory penalty criteria, to recommend civil penalties.

The Panel's recommendations would be required to be explained in writing, and certain procedural safeguards would apply if a Water Board elected to deviate from the Panel's recommendation by more than 10 percent. The Panel would be comprised of senior level

[3] We are aware that the current policy indicates that staff costs should be added to a proposed penalty.

[4] This statement also appears in the current enforcement policy.

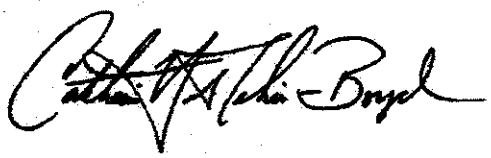
management personnel who possess broader experience and judgment than lower level staff who would likely be tasked with calculating penalties under Alternative 1.
Although there are many opportunities for exercise of discretion under Alternative 1, we are concerned that the step-by-step process and formulas outlined in Alternative 1 would be implemented in a rigid and overly conservative manner if left to more junior level staff.

We are withholding support for Alternative 2 pending additional information about how it would be implemented. At a minimum, this alternative should be revised to require all written penalty assessments and justifications — whether prepared by the Panel or by a Water Board that seeks to deviate from the Panel's recommendation — be made available to the alleged violator at least 30 days prior to the hearing on the ACL, so as to ensure due process and avoid unfair surprise.

We reserve the right to submit further comments on Alternative 2 after additional details have been provided by the State Board.

Thank you for the opportunity to submit these comments. Please feel free to contact me at this office or Michaeleen Mason of my staff at (916) 498-7753 should you have any questions.

Sincerely,



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